REMARKS

A response and amendment was originally filed on August 5, 2009. In response to an Advisory Action mailed on August 21, 2009 an RCE was filed on September 29, 2009 in order to have the previous amendment entered and considered.

For the convenience of the Examiner a copy of the prior response is attached hereto as Exhibit A and incorprated by reference herein in its entirety.

The Examiner's holding that the previous-response and amendment is non-responsive is not agreed with.

In the paper mailed on December 14, 2009 the Examiner states:

> "The reply filed 10/02/2009 is not fully responsive to the prior Office Action because of the following omission(s) or matter(s): The applicant has not fully responded to the rejections set forth in the previous office and has not clearly pointed out the patentable novelty which he or she thinks the claims present in view of the state of the art disclosed by the references cited. Applicant merely: (1) reproduces the portions of the cited reference relied upon by the Examiner, and (2), asserts that the language of the claim is not taught. Therefore, the Applicant has failed to rebut the Examiner's rejection of the claim with any persuasive analysis. Instead, Applicant grounds their argument on a conclusory assertion. This form of argument is wholly ineffective in demonstrating error in the Examiner's prima facie case to establish the patentability of the claims.

The Examiner then cites Ex parte Belinne, No. 2009-004693, slip op. at 7-8 (BPAI Aug 10, 2009)(informative), and further suggests that the Applicant review 37 CFR 1.111, Section (c), which states:

> "In amending in reply to a rejection of claims in an application or patent under reexamination, the applicant or patent owner must clearly point out the patentable novelty which he or she thinks the claims present in view of the state of the art disclosed by the references cited or the objections made. The applicant or patent

owner must also show how the amendments avoid such references or objections."

It is noted that the Examiner did not raise the issue of the previous response and amendment being non-responsive in the Advisory Action mailed on 08/21/2009.

The Examiner's assertion that the Applicant "merely" reproduced portions of the cited reference relied upon by the Examiner, and "merely" asserted that the language of the claim is not taught, is not supported by a reading of the response and amendment.

First, the Applicant's attorney traversed the Examiner's assertion that the teachings of Pavan et al. are in "an analogous art" to the teachings of the newly cited Tafazolli et al. In traversing the Examiner's assertion Applicant's attorney clearly stated why these two teachings would not be found by one skilled in the art to be in an analogous art. Applicant's attorney further argued that a word search of Tafazolli et al. found no occurrences of "packet", "scheduler", "schedule", "queue" or "buffer", thus supporting Applicant's attorney argument that there is no suggestion or motivation to combine the prioritized packet queues of the network scheduler of Pavan et al. with the protocol stack architecture of Tafazolli et al.

Second, and with regard to the rejection under 35 USC 102(e) of dependent claim 32, Applicant's attorney noted the Examiner's reliance on paragraph [0094] of Tafazolli et al. For the conveneice of the Examiner Applicant's attorney then reproduced the subject paragraph and highlighted text therein relating to the QoS related messages and QoS signalling.

Applicant's attorney then clearly argued that the QoS referred to in paragraph [0094] relates simply to the QoS requirements of the mobile network for which the protocol stack architecture is configured.

This argument was advanced due to the fact that Applicant's attorney had amended independent claim 27 (and the other independent claims) to include subject matter found in claim 32, which was cancelled without prejudice or disclaimer. For the convenience of the Examiner Applicant's attorney then reproduced a portion of the amended claim 27 to both show and emphasize the additional subject matter that was added to the claim, i.e.:

> "said processor further configured to interface with at least one of an upper protocol layer and a lower protocol layer on the basis of the configurable protocol engine configuration and to execute functions for processing data in accordance with the configurable protocol engine configuration, **where individual ones of the functions are selected for inclusion in the communication protocol on the basis of at least a level of service provided by the function and at least one cost factor related to the function.**

Applicant's attorney then showed where support for the claim amendment could be found in the specificationof the corresponding published US Patent Application US 2008/0039055 A1. Then, and again for the convenience of the Examiner, Applicant's attorney reproduced several paragaphs from the published specification showing this support, and concluded by stating on page 11:

> "Clearly, the mobile network QoS discussion found in paragraph [0094] of Tafazolli et al. does not disclose or suggest the subject matter found in claim 32, or that is now found in the independent claim 27."

This statement was not a "merely" conclusory assertion, as Applicant's attorney had previously established that the QoS referred to in paragraph [0094] of Tafazolli et al. relates simply and only to the QoS requirements of the mobile network for which the protocol stack architecture is configured.

Note further that amended claim 27 refers in part to "at least one cost factor related to the function". Reviewing again the paragraph [0094] of Taffazolli et al. that was reproduced in the Remarks of the previous response and amendment, there is no

reference to a "cost factor", nor to any thing that might be reasonably construed as "at least one cost factor related to the function".

It is pointed out that when rejecting claim 32 the Examiner merely reproduced the language of claim 32 and then added "(Tafazolli, [0094])". This bare reference to paragraph [0094], without further elaboration by the Examiner, was argued and traversed by Applicant's attorney by stating that the QoS referred to in paragraph [0094] of Tafazolli et al. relates simply and only to the QoS requirements of the mobile network for which the protocol stack architecture is configured.

Clearly, Applicant's attorney has not failed to rebut the Examiner's rejection of the claim, and has rebutted the rejection with a persuasive analysis. Clearly, Applicant's attorney did not ground the argument on merely a conclusory assertion, as the argument advanced should be found to be wholly effective in demonstrating error in the Examiner's prima facie case to establish the non-patentability of the claims.

Clearly, the argument advanced should be found to comply with 37 CFR 1.111, Section (c), as Applicant's attorney did clearly point out the patentable novelty presented by the amended independent claims "in view of the state of the art disclosed by the references cited or the objections made." Applicant's attorney clearly showed how the amendments "avoid such references or objections".

The Examiner's reliance on Ex parte Belinne is also traversed. In this informative opinion the Board of Appeals on pages 5-8 made note with respect to each of the argued claims that the Appellants had merely argued that the reference (Lee) did "not teach or suggest", or did not "disclose or suggest", the reproduced text from the claim, and that the Appeal Brief "presents no other arguments" with respect to each of the argued claims. The finding of the Board of Appeals was that the Appellant's argument simply repeatedly restated elements of the claim language, and simply argued that the elements are missing from the reference, and was thus insufficient.

The Board stated that the Appellants did "not present any arguments to explain why the Examiner's explicit fact finding is in error".

In the last-filed response and amendment Applicant's attorney not only argued that the two references cited were not in an analogous art, as stated by the Examiner, but also argued that the paragraph [0094] of Tafazolli et al., cited without comment or elaboration by the Examiner as teaching the subject matter of dependent claim 32, did <u>not</u> teach the claimed subject matter. In fact, Applicant's attorney established that the QoS referred to in paragraph [0094] of Tafazolli et al. relates simply to the QoS requirements <u>of the mobile network</u> for which the protocol stack architecture is configured. This argument alone should suffice to traverse the Examiner's rejection that paragraph [0094] of Tafazolli et al. discloses where "individual ones of the <u>functions</u> are <u>selected for inclusion in the communication protocol</u> on the basis of <u>at least a level of service provided by the function and at least one cost factor related to the function</u>."

In the Advisory Action comments the Examiner stated:

> "With regards to Applicant's argument that the prior art fails to teach wherein functions are selected based on level of service or cost factors, Examiner respectfully disagrees.
> The Applicant defines the claimed "functions" as functions that execute "for processing data in accordance with the configurable protocol engine". See claim 1.
> The reference at [0094] recites, "QoS management features should be employed within every layer of the protocol stack and QoS control and management mechanisms should be in place on every architectural layer." This statement shows that the system, when factoring in the specified QoS parameters, clearly factors in QoS control and management mechanisms when reconfiguring the protocol in order to meet the QoS requirements. It is these mechanisms that are clearly executing for processing data in accordance with the configurable protocol engine since these mechanisms clearly make up the use of the protocol.
> As such, the rejection is maintained."

The inclusion of these comments would appear to indicate that the Examiner did at least previously consider that Applicant's attorney had clearly pointed out the "patentable novelty which he or she thinks the claims present in view of the state of the art" (37 CFR 1.111(c).

In any event, the rejection of claim 32 (now rewritten in to the indepdnent claims), was based on a purported anticipation of the claimed subject matter under 35 USC 102(e). As was noted above, claim 27 now recites in part:

> where individual ones of the <u>functions are selected for inclusion in the communication protocol</u> on the basis of at least a <u>level of service provided by the function</u> **and** <u>at least one cost factor related to the function.</u>

It is not seen where the cited paragraph [0094] of Tafazolli et al. expressly discloses this subject matter, or renders this subject matter obvious.

First, it is clearly not admitted that the quality of service (QoS) requirement of a mobile network is analogous or equivalent to "<u>a level of service provided by the function</u>" that is selected for inclusion in a communication protocol.
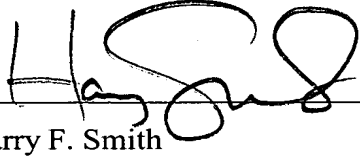
Second, it is not seen where the paragraph [0094] of Tafazolli et al. expressly discloses or suggests "at least one cost factor related to the service". The Examiner's argument in the Advisory Action is not seen to mention the "cost factor" at all. In fact, a word search of Tafazolli et al. does not find a single occurrence of the word "cost".

The Examiner is respectfully requested to reconsider the last-filed response and amendment in view of the further comments herein, and to withdraw the holding that the last-filed response and amendment was non-responsive. Should the Examiner not be so inclined, he is respectfully requested to telephone the undersigned attorney to schedule a telephone interview in order to resolve this issue.

Respectfully submitted:

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1-14-2010

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I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. BOX 1450, Alexandria, VA 22313-1450.

1/14/2010   Elaine F. Mcain

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